

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT  
LOCATION: PORTLAND

ARS ARCHITECTURE, PA,

Plaintiff,

v.

MERRILL DRIVE, LLC, et al.,

Defendants.

DOCKET NO. BCD-RE-18-01

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ARS ARCHITECTURE, PA,

Plaintiff,

v.

WINTER STREET, LLC, et al.,

Defendants.

DOCKET NO. BCD-CV-18-03

**COMBINED ORDER ON PLAINTIFF'S MOTIONS TO WITHDRAW  
AND AMEND ADMISSIONS**

Pending before the Court in the two related and above-captioned matters is Plaintiff ARS Architecture's ("ARS") motions to withdraw and amend deemed admissions. Pursuant to its discretionary authority under M.R. Civ. P. 7(b)(7) the Court rules on the motions without hearing.

**BACKGROUND**

On March 2, 2018, the Court heard oral argument on motions to dismiss in the above-captioned matters. At the hearing it was brought to the Court's attention that Defendants had served a request for admissions on ARS pursuant to M.R. Civ. P. 36(a) in both cases and that ARS had failed to respond to these requests within the thirty-day deadline imposed by the rule. As such, the requested admissions are deemed admitted under the rule, subject to the provisions of M.R. Civ.

P. 36(b). M.R. Civ. P. 36(a). The Court suggested that ARS could file a motion to request leave to withdraw its admissions and, if granted, respond substantively to the Defendants' requests. ARS thereafter filed the instant motions.

### **STANDARD OF REVIEW**

“Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.” M.R. Civ. P. 36(b). “[F]ailure to respond may not always be fatal; the court may, on motion, allow a party to withdraw or amend a deemed admission[.]” 2 Harvey & Merritt, *Maine Civil Practice* § 36:3 at 728 (3d, 2011 ed.) “The kind of prejudice contemplated by Rule 36(b) involves unavailability of key witnesses or last-minute difficulty in obtaining evidence on an issue thought to have been resolved by the request for admissions.” *Id.* (citing *Brook Vill. N. Assocs. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982)).

### **DISCUSSION**

At the hearing and in its written motion, ARS was frank that its failure to respond to the Defendants' requests for admissions was a result of its counsel's “mistaken impression that all discovery requests were stayed pending a dispositive [m]otion.” (Pl's Mot. Withdraw ¶ 4.)<sup>1</sup> ARS now asks this Court “not to excuse the error of its counsel” but “respectfully requests that . . . [it] be permitted to withdraw and amend those deemed admissions because doing so will subserve the presentation of the merits of this proceeding and will not prejudice Defendants[.]” (*Id.* ¶ 11.) The main thrust of Defendants' argument is that the deemed admissions relate to factual issues that

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<sup>1</sup> Plaintiff's motions were virtually identical in both docket numbers.

should not be in controversy and that ARS's counsel has already admitted to the truth of those admissions before this Court at the March 2 hearing. ARS vehemently disputes that its deemed admissions relate to uncontroversial facts and could indeed foreclose one of its main arguments as to the personal liability of Defendant Jacob Dowling.

However, the standard by which this Court must review ARS's motion does not relate to the substance of the admissions. Rather, the burden is on the "the party who obtained the admission . . . to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits." M.R. Civ. P. 36(b). Whether "some of the requests went to the ultimate issue, involved matters that were contested . . . , entailed legal conclusions or were inadmissible at trial" is irrelevant to this inquiry. *See Diversified Comm'ns, Inc. v. Godard*, 549 A.2d 362, 363 (Me. 1988). The type of "prejudice" contemplated by the rules is not merely whether the deemed admissions are helpful to the Defendants' case; under such a standard, motions to withdraw or amend deemed admissions would virtually never be granted. Instead, the type of prejudice contemplated by the rule "involves unavailability of key witnesses or last-minute difficulty in obtaining evidence on an issue thought to have been resolved by the request for admissions." 2 Harvey & Merritt, *Maine Civil Practice* § 36:3 at 728 (3d, 2011 ed.).

Defendants make no showing of this kind of prejudice in their opposition to ARS's motion. Indeed, their argument as to prejudice is circular: "Defendants and the Court would be prejudiced by the withdrawal of admissions because they would contradict what ARS already has judicially admitted . . . ." (Def's Opp'n to Pl's Mot. Withdraw 6.)<sup>2</sup> To the extent that Defendants have relied on ARS's deemed admissions with the knowledge that ARS intended to file the instant motions, which are within the Court's discretionary authority and reviewed under a permissive standard,

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<sup>2</sup> In No. BCD-RE-18-01.

that prejudice is outside the scope of what the Court should properly consider upon a motion brought pursuant to M.R. Civ. P. 36(b) to withdraw or amend deemed admissions.

In sum, Defendants have failed to meet their burden to show that they would be prejudiced in the manner contemplated by M.R. Civ. P. 36. The Court exercises its discretion and GRANTS Plaintiff ARS's motions to withdraw and amend deemed admissions.

### **CONCLUSION**

Based on the foregoing it is hereby ORDERED that:

Plaintiff ARS's motions to withdraw and amend deemed admissions in No. BCD-RE-18-01 and No. BCD-CV-18-03 are GRANTED. Plaintiff shall serve responses to the requests to admit within 21 days of the date of this order.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: August 23, 2018

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Richard Mulhern  
Judge, Business and Consumer Court